

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR23-32

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**Title**

Indian Child Welfare Act (ICWA):  
Discretionary Tribal Participation

**Action Requested**

Review and submit comments by May 12,  
2023

**Proposed Rules, Forms, Standards, or Statutes**

Amend Cal. Rules of Court, rules 5.482 and  
5.530; approve form ICWA-042

**Proposed Effective Date**

January 1, 2024

**Proposed by**

Tribal Court–State Court Forum  
Hon. Abby Abinanti, Cochair  
Hon. Joyce Hinrichs, Cochair

**Contact**

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Family and Juvenile Law Advisory  
Committee

Hon. Stephanie E. Hulseley, Cochair  
Hon. Amy M. Pellman, Cochair

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### Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee propose that, effective January 1, 2024, the Judicial Council amend California Rules of Court, rules 5.482 and 5.530, and approve *Request for Tribal Participation* (form ICWA-042). These rules and this form clarify the process and set standards consistent with California statutes for the court’s exercise of discretion to permit the participation of a tribe in juvenile cases involving a child affiliated with the tribe, despite no statutory right to participate or intervene under the Indian Child Welfare Act (ICWA) and section 224.4 of the Welfare and Institutions Code. As discussed in more detail below, although California law set out in the Welfare and Institutions Code protects the relationship between tribes and their children beyond the scope of ICWA and permits tribal participation in juvenile cases in various situations where ICWA does not apply, tribal leaders and other advocates report that courts often decline to permit tribes to participate in juvenile cases if ICWA does not apply.

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.*

## Background

ICWA (title 25 of the United States Code sections 1901-1963) provides certain legal rights to federally recognized Indian tribes with respect to child custody proceedings involving an Indian child, which is defined as any unmarried person who is under age 18 and is either (1) a member of an Indian tribe, or (2) eligible for membership in an Indian tribe and who is the biological child of a member of an Indian tribe. Among the rights that ICWA recognizes is the tribe's right to intervene in the case at any time. When ICWA applies, but the tribe chooses not to intervene, California Rules of Court, rule 5.534(e)(2) still provides the child's tribe with certain rights to participate in a case involving an Indian child. The California legislature has also acted to protect the relationship between Native American and Indian children<sup>1</sup> and their tribes and tribal communities. In section 224 of the Welfare and Institutions Code, the legislature states that California is committed to "...establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community." California law goes beyond ICWA in several relevant ways. Section 306.6 of the Welfare and Institutions Code<sup>2</sup> authorizes a "...tribe not recognized to have tribal status under federal law" (also known as an "unrecognized tribe") to participate in dependency proceedings. In 2019 the legislature amended section 16001.9 of the Welfare and Institutions Code (often referred to as the Foster Care Bill of Rights) to include protections for the cultural and political connection of all Native American and Indian children in foster care.<sup>3</sup> These protections are separate and apart from the requirements of ICWA.

This proposal addresses three specific categories of cases where ICWA may not apply, but where either the tribal group or the child may have a right to some manner of tribal participation in a juvenile case: (1) cases involving Indian children who are in the juvenile court because of an act that would be a crime if it were committed by an adult or as to whom ICWA does not apply for some other reason; (2) cases involving unrecognized tribes; and (3) children whose parents are members of tribes and are considered part of the tribal community, but who do not meet the definition of Indian child, often referred to as "heritage cases."

In each of these situations, the law recognizes a relationship between the tribe and the child notwithstanding that ICWA does not apply. Section 306.6 of the Welfare and Institutions Code specifically provides the court with discretion to allow the child's tribe to participate in the proceedings. Sections 346 and 676 of the Welfare and Institutions Code permit juvenile courts to allow anyone with a "direct and legitimate interest" in a case to be admitted to a juvenile court hearing.<sup>4</sup> Several courts have adopted standing orders under the authority of these sections to

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<sup>1</sup> The term "Indian child" is used for children who meet the definition of Indian child in ICWA. The term Native American child is used for children who are affiliated with a tribe but do not meet the definition of Indian child.

<sup>2</sup> Added by [SB 678 \(Stats. 2006, ch. 838\)](#) which wove many provisions of ICWA into the Welfare and Institutions Code, the Family Code and the Probate Code.

<sup>3</sup> See [AB-175 \(Stats. 2019, ch. 416\)](#).

<sup>4</sup> Section 346 is available at:

[https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=9..](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=9..) Section 676 is available at

create a presumption that tribes be permitted to participate in juvenile proceedings involving children affiliated with the tribe.<sup>5</sup>

This proposal would provide guidance for the exercise of that discretion and the role of a tribe when it is permitted to participate, consistent with Welfare and Institutions Code section 306.6 and California Rules of Court, rule 5.534(e)(2) which addresses participation of non-intervening tribes in ICWA cases.

### **Juvenile Justice Cases**

Indian children who are placed into foster care are entitled to all the same rights as other foster children under Welfare and Institutions Code section 16001.9 (commonly referred to as the Foster Care Bill of Rights),<sup>6</sup> and have unique protections for their cultural and political identity as Indian children. These protections for the cultural and political rights of Indian children in foster care apply equally whether they are placed in foster care under Welfare and Institutions Code sections 300 (the juvenile dependency code section) or 601 or 602 (the juvenile justice code sections)—even though ICWA does not apply to most juvenile justice cases. These protections include the right to:

1. A placement that upholds the prevailing social and cultural standards of the child’s Indian community, including, but not limited to, family, social, and political ties (Welf. & Inst. Code, § 16001.9(a)(1));
2. Be provided with names and contact information for representatives of the child’s Indian tribe and to communicate with these individuals privately (Welf. & Inst. Code, § 16001.9(a)(11));
3. Have contact with tribal members and members of the child’s Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe (Welf. & Inst. Code, § 16001.9(a)(14));
4. Engage in traditional Native American religious practices (Welf. & Inst. Code, § 16001.9(a)(15));

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[https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=17](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=17).

<sup>5</sup> See the Order of the Superior Court of California, County of San Diego “In the Matter of: Tribal Participation in Juvenile Dependency and Juvenile Justice Cases Not Governed by the Indian Child Welfare Act” available at: [https://www.sdcourt.ca.gov/sites/default/files/sdcourt/juvenile3/policiesproceduresandprotocols/juvpoliciesproceduresandprotocolsforms/order\\_author\\_tribes.pdf](https://www.sdcourt.ca.gov/sites/default/files/sdcourt/juvenile3/policiesproceduresandprotocols/juvpoliciesproceduresandprotocolsforms/order_author_tribes.pdf) and Rule 9.1 of Local Rules of Superior Court of California, County of Inyo referencing standing orders dealing with this issue <https://www.inyo.courts.ca.gov/system/files?file=localrules.pdf>

<sup>6</sup> Available at:

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=WIC&sectionNum=16001.9](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=16001.9).

5. Have probation personnel who have received instruction on ICWA and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care (Welf. & Inst. Code, § 16001.9(a)(20));
6. Have recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship, receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village, and be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village (Welf. & Inst. Code, § 16001.9(a)(21));
7. Have a representative of the child's Indian tribe in attendance during hearings (Welf. & Inst. Code, § 16001.9(a)(34)); and
8. Have a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community (Welf. & Inst. Code, § 16001.9(a)(37)).

These provisions recognize a strong beneficial relationship between an Indian child and the child's tribe including in juvenile justice cases.

### **Unrecognized tribes**

Section 306.6 of the Welfare and Institutions Code<sup>7</sup> permits the court to allow an unrecognized tribe from which a child is descended to participate in a dependency proceeding. In addition, section 16001.9 of the Welfare and Institutions Code, as amended in 2019, provides protection to certain rights of all children in foster care that may be particularly important to those children who identify as Native American, and will apply even if their tribe is not federally recognized. These include the right to:

1. Receive adequate clothing, grooming, and hygiene products that respect the child's culture and ethnicity (Welf. & Inst. Code, § 16001.9(a)(3));
2. Be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available (Welf. & Inst. Code, § 16001.9(a)(5));
3. Attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices (Welf. & Inst. Code, § 16001.9(a)(15)); and

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<sup>7</sup> Available at:

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=WIC&sectionNum=306.6](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=306.6).

4. Participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities (Welf. & Inst. Code, § 16001.9(a)(16)).

Section 306.6 states that:

(d) This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe in the circumstances set out in subdivision (a) to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians. This section shall not be construed to make the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), or any state law implementing the Indian Child Welfare Act, applicable to the proceedings, or to limit the court's discretion to permit other interested persons to participate in these or any other proceedings.

(e) The court shall, on a case-by-case basis, make a determination if this section is applicable and may request information from the tribe, or the entity claiming to be a tribe, from which the child is descended for the purposes of making this determination, if the child would otherwise be an Indian child pursuant to subdivision (a).

### **Heritage cases**

Sometimes a child's parents are members of a tribe, but the child is not a member or eligible for membership. This can be because the tribe's membership rolls are closed, or because the child does not meet one or more of the tribe's specific membership criteria. These children may still live on tribal lands, be eligible for tribal services, and be considered members of the tribal community.

Under section 16001.9 of the Welfare and Institutions Code, these children have the same rights as described above for children from unrecognized tribes to maintain their cultural and political connections to the tribe.

Protection of these rights is furthered by the participation of the tribe with which the child and family are affiliated, notwithstanding that the child does not meet the definition of Indian child under ICWA. Sections 346 and 676 of the Welfare and Institutions Code<sup>8</sup> permit the judicial officer presiding over a case to admit to a hearing such persons as are deemed to have a direct and legitimate interest in the case or work of the court. As discussed above, several courts have adopted local standing orders creating a presumption that tribes have a direct and legitimate interest in cases involving their children.

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<sup>8</sup> Available at:

[https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=9](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=9).

## **The Proposal**

This proposal responds to a concern identified by tribal advocates and leaders that courts often will not allow a tribe to participate in a juvenile case if ICWA does not apply. It advances the Judicial Council's goals of access to justice for Native American and Indian children and their tribes by protecting the rights to maintain cultural and political connections discussed above. This proposal would provide guidance and ensure consistency in accordance with the statutes discussed above, in cases falling within these three categories where ICWA does not mandate, but state laws allow tribal participation in a juvenile case. Tribes, particularly unrecognized tribes, often have limited resources. They may participate in court via a tribal representative rather than an attorney. It can be challenging for tribal advocates to draft requests for orders without additional guidance. This proposal would create a process and provide a form for tribes to use when they want to participate in actions involving their children when ICWA does not apply. It provides presumptions that are consistent with state policies in furthering tribal participation.

The proposal would amend California Rules of Court, rule 5.482(d), which currently implements section 204.4 of the Welfare and Institutions Code governing tribal intervention in cases where ICWA mandates apply, to address tribal participation in the three situations discussed above where ICWA does not mandate, but where state laws allow tribal participation. Each of the three case types is set forth in a new, separate paragraph because each relies on different sections of the Welfare and Institutions Code that provide slightly different protections to Native American and Indian children and their tribes. Each establishes a presumption that a child's tribe should be permitted to participate. A fourth new paragraph lists, for tribes whose request to participate has been granted, the actions they may take to participate in the proceedings. This list mirrors the extent of participation that the Legislature has established in section 306.6 of the Welfare and Institutions Code for unrecognized tribes and the council has already echoed in rule 5.534(e)(2) for tribes in ICWA cases where they choose not to intervene.

The proposal would also amend rule 5.530, which governs the persons permitted to be present during juvenile proceedings, by adding subdivision (g) to clarify that discretionary tribal participation is governed by the new provisions in rule 5.482.

The committees also propose a new, optional form that tribes may use to make a request to participate in a case.<sup>9</sup>

## **Alternatives Considered**

The committees considered whether educational resources or job aids would be sufficient to address the issues raised by tribal leaders and advocates. Given the complexity of the legal issues and the importance of the interests and rights of tribal children and tribes that are at stake, the

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<sup>9</sup> The proposed form must be signed under penalty of perjury because asserts facts that the court is asked to rely upon in deciding whether to permit tribal participation. Because the law does not specifically require a signature under penalty of perjury the committees are considering whether to retain this requirement.

committees decided that rules and forms were the best way to protect those rights and interests and bring consistency to the exercise of discretion across courts.

### **Fiscal and Operational Impacts**

The committees do not anticipate fiscal or operational impacts beyond the updating of systems to reflect the new form. By providing greater clarity and creating a process and form, the committees believe that this proposal will ultimately reduce contested motions.

#### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committees are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committees also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rules 5.482 and 5.530, at pages 8–9
2. Form ICWA-042, at page 10

Rules 5.482 and 5.530 of the California Rules of Court would be amended, effective January 1, 2024, to read:

1 **Rule 5.482. Proceedings after notice**

2  
3 (a)–(c) \* \* \*

4  
5 (d) **Intervention and tribal participation**

6  
7 (1) When the Indian Child Welfare Act applies, the Indian child’s tribe and Indian  
8 custodian are entitled to intervene, orally or in writing, at any point in the  
9 proceedings. The tribe may, but is not required to, file with the court the *Notice*  
10 *of Designation of Tribal Representative in a Court Proceeding Involving an*  
11 *Indian Child* (form ICWA-040) to give notice of its intent to intervene.

12  
13 (2) When the Indian Child Welfare Act does not apply, but there is discretion to  
14 allow a tribe to participate in a juvenile case, the tribe may request permission  
15 to participate in the proceedings using the *Request for Tribal Participation*  
16 (form ICWA-042) and the court should exercise its discretion as follows:

17  
18 (A) In cases involving an Indian child, the child’s tribe may request permission to  
19 participate in the proceedings under section 346 or 676 of the Welfare and  
20 Institutions Code. Consistent with sections 224 and 16001.9 of the Welfare  
21 and Institutions Code, there is a presumption that the tribe has a direct and  
22 legitimate interest in the proceedings under section 346 or 676 of the Welfare  
23 and Institutions Code and the request should be approved absent a finding by  
24 the court that the tribe’s participation would not assist the court in making  
25 decisions that are in the best interest of the child.

26  
27 (B) In a proceeding involving a child described by section 306.6 of the Welfare  
28 and Institutions Code, the tribe from which the child is descended may request  
29 permission to participate in the proceedings. Consistent with sections 224 and  
30 16001.9 of the Welfare and Institutions Code, the request should be approved  
31 absent a finding by the court that the tribe’s participation would not assist the  
32 court in making decisions that are in the best interest of the child.

33  
34 (C) When a child does not meet the definition of an Indian child but either of the  
35 child’s parents is a member of a tribe and the tribe wishes to participate in  
36 juvenile proceedings involving the child, the tribe may request permission to  
37 participate in the proceedings under section 346 or 676 of the Welfare and  
38 Institutions Code. Consistent with sections 224 and 16001.9 of the Welfare  
39 and Institutions Code, there is a presumption that the tribe has a direct and  
40 legitimate interest in the proceedings under section 346 or 676 of the Welfare  
41 and Institutions Code and the request should be approved absent a finding by



1 the court that the tribe's participation would not assist the court in making  
2 decisions that are in the best interest of the child.

3  
4 (D) Upon approval of a request, although the tribe does not become a party, unless  
5 the court orders otherwise, the tribe is authorized to:

6  
7 (i) Be present at the hearing;

8  
9 (ii) Address the court;

10  
11 (iii) Request and receive notices of hearings;

12  
13 (iv) Request to examine court documents relating to the proceeding;

14  
15 (v) Present information to the court that is relevant to the proceeding;

16  
17 (vi) Submit written reports and recommendations to the court; and

18  
19 (vii) Perform other duties and responsibilities as requested or  
20 approved by the court.

21  
22 (e)–(g) \* \* \*

23  
24 **Rule 5.530. Persons present**

25  
26 (a)–(f) \* \* \*

27  
28 **(g) Discretionary tribal participation (§§ 224, 306.6, 346, 676, 827, 16001.9)**

29  
30 When a proceeding not governed by the Indian Child Welfare Act involves an  
31 Indian child, a child descended from an Indian tribe, or a child described by section  
32 306.6 of the Welfare and Institutions Code, a request by the child's tribe to  
33 participate in the proceeding is governed by rule 5.482(d)(2).

|  |   |
|--|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY<br>STATE BAR NUMBER:<br>NAME:<br>FIRM NAME:<br>STREET ADDRESS:<br>CITY: STATE: ZIP CODE:<br>TELEPHONE NO.: FAX NO.:<br>EMAIL ADDRESS:<br>ATTORNEY FOR (name): | FOR COURT USE ONLY<br><br><b>DRAFT</b><br><b>Not approved by</b><br><b>the Judicial Council</b> |
| <b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b><br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME:  |   |
| CHILD'S NAME:  |   |
| <b>REQUEST FOR TRIBAL PARTICIPATION</b>  | CASE NUMBER:<br>RELATED CASES (if any):   |

TO ALL PARTIES:

1. The (name of tribe): \_\_\_\_\_ is a  federally recognized tribe  
 a tribe not recognized to have tribal status under federal law. (Welfare and Institutions Code section 306.6.)
  
2. The above named child or children are (select one):
  - a.  Members of the tribe;
  - b.  Eligible for membership in the tribe and the biological child of a member; or
  - c.  Otherwise affiliated with the tribe and considered members of the tribal community.
  
3. The tribe is (select one):
  - a.  requesting leave to participate in the proceedings involving an Indian child but to which ICWA does not apply. (Welfare and Institutions Code sections 346 and 676.)
  - b.  requesting leave to participate in the proceedings involving a child who would otherwise be an Indian child but for the status of the child's tribe. (Welfare and Institutions Code section 306.6.)
  - c.  requesting leave to participate in the proceedings involving a child who is affiliated with the tribe but does not meet the definition of an Indian child. (Welfare and Institutions Code sections 346 and 676.)

4. The tribe requests that notice of all proceedings be sent to:

Name:

Title:

Address:

City:

State:

Zip Code:

Telephone:

Fax:

Email:

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date: \_\_\_\_\_

\_\_\_\_\_  
 (TYPE OR PRINT NAME)

  
 \_\_\_\_\_  
 (SIGNATURE)